

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 7, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2816

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KEVIN KIRSCH,

Plaintiff-Appellant,

v.

**PAT SIEDSCHLAG, LIEUTENANT
STEVEN SCHNEIDER, CAPTAIN
SAM SCHNEITER, KYLE DAVIDSON,
WARDEN JEFFREY ENDICOTT,
BARBARA WHITMORE, DR. VIOYA DASGUPTA,
OFFICER WILL ROGERS, LIEUTENANT JACOB,
CAPTAIN PRIEVE, NURSE BETH RATA CZAK,
CAPTAIN TRATTLES, DOCTOR GALIOTO,
NURSE KLOOSTRA, NURSE BUCHHOLZ,
NURSE HALGERSON, AND SERGEANT WARNEKE,**

Defendants-Respondents.

APPEAL from an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. Kevin Kirsch appeals from an order dismissing his motion to reopen an order under § 806.07(1)(h), STATS. Kirsch argues that the trial court erred when it concluded that his motion was barred by the doctrine of *res judicata*. We agree with Kirsch and therefore reverse.

BACKGROUND

Kevin Kirsch is a prisoner who commenced an action against the Columbia Correctional Institution and several Department of Corrections employees alleging that his civil rights were violated. The parties eventually entered into a stipulation and by order dated July 2, 1993, the trial court dismissed the action. Almost one year later, Kirsch moved the trial court pursuant to § 806.07(1)(h), STATS., to vacate the order dismissing the action. The court denied the motion concluding that it was barred by *res judicata*. It gave no other reason for its decision. Kirsch appeals.

RELIEF FROM JUDGMENTS OR ORDERS

The decision to grant or deny a motion for relief from a judgment or order rests within the sound discretion of the trial court. *Schauer v. DeNeveu Homeowners Ass'n, Inc.*, ___ Wis.2d ___, ___, 533 N.W.2d 470, 473 (1995). We will uphold a discretionary decision if the trial court exercised its discretion and there is a reasonable basis for its decision. *Nelson v. Taff*, 175 Wis.2d 178, 187, 499 N.W.2d 685, 689 (Ct. App. 1993). We will reverse, however, a decision that is premised upon a misapplication or erroneous view of the law. *Allstate Ins. Co. v. Konicki*, 186 Wis.2d 140, 150, 519 N.W.2d 723, 726 (Ct. App. 1994).

Section 806.07(1)(h), STATS., provides that a trial court may relieve a party from an order or stipulation for any reason justifying relief from the operation of the judgment. Under this section, a court must determine whether, in view of all the facts, "extraordinary circumstances" exist which may justify relief in the interests of justice. *State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis.2d 618, 625-26, 511 N.W.2d 868, 871 (1994). Thus, relief is appropriate "when the circumstances are such that the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be

done in light of *all* the facts.'" *Nelson*, 175 Wis.2d at 188, 499 N.W.2d at 689 (quoted source omitted).

The State argues that the doctrine of *res judicata* precludes Kirsch from attacking the order. The doctrine provides that a final judgment is conclusive in all subsequent actions between the same parties as to all matters that were litigated or that might have been litigated in the former proceeding. *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983). Kirsch argues that this is not a collateral attack, but a direct attack on the order and therefore, the doctrine of *res judicata* is inapplicable.

We agree with Kirsch. A separate action intended to collaterally attack the order might be barred by *res judicata*, but that is not the procedural posture of this case. Kirsch is directly attacking the prior order by moving for relief from the order under § 806.07(1)(h), STATS. Were we to adopt the State's position, no judgment or order could ever be directly attacked under § 806.07, and the statute would become meaningless. We conclude that the doctrine of *res judicata* does not apply to direct attacks on judgments or orders and that the trial court erroneously exercised its discretion because its decision was based upon a misapplication of the law. Thus, we reverse and remand to the trial court for a determination of whether, under § 806.07(1)(h), "extraordinary circumstances" exist which justify relief in the interests of justice.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.